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No. 05-705

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SUPREME COURT, U.S.

# In the Supreme Court of the United States

GLOBAL CROSSING TELECOMMUNICATIONS, INC.,

*Petitioner*,

v.

METROPHONES TELECOMMUNICATIONS, INC.,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## SUPPLEMENTAL BRIEF FOR RESPONDENT

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## SUPPLEMENTAL BRIEF FOR RESPONDENT

Pursuant to Rule 25.5 of the Rules of this Court, respondent Metrophones respectfully submits this supplemental brief to present a single late authority that was not available to be included in Metrophones' brief on the merits. Specifically, Metrophones calls to the Court's attention an Order the Federal Communications Commission (FCC) released on September 15, 2006, after briefing in this case was complete. App., *infra*, 1a-15a. The Order "take[s] th[e] opportunity to reaffirm and amplify what the Commission has concluded twice before: that 'failure to pay in accordance with the Commission's payphone rules, such as the rules expressly requiring such payment ..., constitutes ... an unjust and unreasonable practice in violation of secton 201(b) of the [Communications] Act.'" App., *infra*, 9a (ellipses in original) (quoting *2003 Payphone Order*, 18 F.C.C.R. at 19,990 ¶ 32); see App., *infra*, 9a-13a (elaborating).

Metrophones and the United States have argued in their briefs filed July 26, 2006, that the FCC had already said more than enough about this subject to merit *Chevron* deference, and that the FCC's conclusions are compatible with the governing statutory framework and reasonable. The new Order provides still further confirmation (though none should be necessary) of the reasonableness of the FCC's consistent interpretation. It also renders more untenable than ever the D.C. Circuit's decision – which conflicts with the Ninth Circuit decision below – in *APCC Services, Inc.* v. *Sprint Communications Co.*, 418 F.3d 1238, 1248 (D.C. Cir. 2005) ("We do not say that the Commission has no power to interpret § 201(b) to encompass violations of its rules, and thereby to create private rights of action in courts when previously there were none. We do say the Commission did not attempt to exercise any such power here."), petition for cert filed, 74 U.S.L.W. 3371 (U.S. Dec. 12, 2005) (No. 05-766).

The FCC's new Order is by no means necessary to allow this Court to resolve this case in respondent's favor. It cannot be ignored, however. An agency's "interpretation of [regula-

tions or statutes] in an administrative adjudication * * * *is* agency action, not a *post hoc* rationalization of it." *Martin* v. *OSHRC*, 499 U.S. 144, 157 (1991) (emphasis in original); see also *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-741 (1996); *Barnhart* v. *Walton*, 535 U.S. 212, 221 (2002).

## CONCLUSION

For the reasons stated above and in respondent's brief and the amicus brief supporting respondent, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 2006

# APPENDIX

Federal Communications Commission

Order on Review

IN THE MATTER OF APCC SERVICES, INC., DATA NET SYSTEMS, LLC, DAVEL COMMUNICATIONS, INC., JAROTH, INC. D/B/A PACIFIC TELEMANAGEMENT SERVICES, AND INTERA COMMUNICATIONS CORP., COMPLAINANTS,

v.

NETWORKIP, LLC, AND NETWORK ENHANCED TELECOM, LLP, DEFENDANTS.
File No. EB-003-MD-011

FCC 06-139
Adopted: September 14, 2006
Released: September 15, 2006

By the Commission:

## I. INTRODUCTION

1. In this Order on Review, we deny an Application for Review[1] filed by NetworkIP, LLC, and Network Enhanced Telecom, LLP (collectively, "Network") pursuant to section 1.115 of our rules.[2] The Application challenges a Memorandum Opinion and Order[3] released by the Enforcement Bureau ("Bureau") granting a liability complaint[4] filed by Complainants

[1] Application for Review, File No. EB-003-MD-011 (filed Mar. 1, 2005) ("Application").

[2] 47 C.F.R. § 1.115

[3] *APCC Services, Inc. v. NetworkIP, LLC*, Memorandum Opinion and Order, 20 FCC Rcd 2073 (Enf. Bur. Feb. 1, 2005) ("*Bureau Liability Order*").

[4] Formal Complaint, File No. EB-003-MD-011 (filed June 3, 2003)

(collectively, "APCC") against Network pursuant to section 208 of the Communications Act of 1934, as amended ("Act").[5] The *Bureau Liability Order* found, *inter alia*, that Network's failure to compensate APCC for certain completed payphone calls in accordance with section 64.1300 of our rules[6] violated section 201(b) of the Act.[7] As explained below, Network's Application presents no facts or arguments that persuade us that the Bureau made any procedural or substantive errors. Consequently, we affirm the *Bureau Liability Order* and deny the Application.[8] In doing so, we reiterate that, consistent with common industry parlance, the term "facilities-based" carrier, as used in our payphone compensation rules and orders, means an entity that has a possessory interest in a switch involved in routing the calls for which compensation is sought.

## II. BACKGROUND

2. The *Bureau Liability Order* explains in detail the factual and legal background of the dispute raised in this formal complaint proceeding.[9] In brief, Complainants are, or act as the billing and collection agents of, payphone service providers

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("Complaint").

[5] 47 C.F.R. § 208.

[6] 47 C.F.R. § 64.1300. Unless otherwise indicated, all C.F.R. references to Part 64 of the Commission's rules are to the rules in effect during the period October 7, 1997 through November 23, 2001.

[7] 47 U.S.C. § 201. *See, e.g., Bureau Liability Order*, 20 FCC Rcd at 2074, ¶ 1, and 2085, ¶ 26.

[8] APCC filed a motion to strike Network's Application on procedural grounds. Complainants' Motion to Strike Defendants' Application for Review, File No. EB-003-MD-011 (filed Mar. 16, 2005). *See* Opposition to Complainants' Motion to Strike, File No. EB-03-MD-011 (filed Mar. 23, 2005). Because we are denying the Application on substantive grounds, we dismiss APCC's motion as moot.

[9] *Bureau Liability Order*, 20 FCC Rcd at 2074-78, ¶¶ 2-13. We incorporate by reference those explanations.

("PSPs").[10] Network is a telecommunications carrier that owns switches and offers other entities a package of telecommunications services that enables those entities ("Debit Card Providers") to provide pre-paid calling cards to end-user customers.[11] The parties dispute whether it is Network or the Debit Card Providers who bears the responsibility under our rules and orders for payment of dial-around compensation to APCC for certain completed "coinless" payphone calls, *i.e.*, coinless calls that were routed, in part, by a Network-owned switch, and that were made by end users from APCC's payphones using prepaid calling cards sold by Debit Card Providers.[12]

3. As the *Bureau Liability Order* stated, the applicable rule during the relevant period was the following: with respect to each call at issue, whichever entity -- Network or a Debit Card Provider -- was the last identified "facilities-based" carrier before the terminating local exchange carrier ("LEC") in the chain of entities responsible for the call (hereinafter, the "last 'facilities-based' carrier") must compensate APCC for the use of its payphones to place those calls.[13] The *Bureau Liability Order* further found, based on Commission precedent, that to be "facilities-based," a carrier must have a possessory interest in a switch used to route the calls.[14]

4. Applying those standards to the facts here, the *Bureau Liability Order* concluded that Network, and not the Debit Card

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[10] *Bureau Liability Order*, 20 FCC Rcd at 2074, ¶ 2.

[11] *Bureau Liability Order*, 20 FCC Rcd at 2077, ¶¶ 9-10.

[12] *Bureau Liability Order*, 20 FCC Rcd at 2078-79, ¶ 13, 2080-81, ¶ 17, 2082-83, ¶ 21, 2083, ¶ 22, 2084, ¶ 24.

[13] *Bureau Liability Order*, 20 FCC Rcd at 2077-78, ¶¶ 10-11. Network effectively acknowledged that rule below (*Bureau Liability Order*, 20 FCC Rcd at 2079, ¶ 14) and does not challenge that rule here.

[14] *Bureau Liability Order*, 20 FCC Rcd at 2079-82, ¶¶ 14-20.

Providers, was the last "facilities-based" carrier, because Network, and not the Debit Card Providers, was the last non-LEC carrier in the chain of entities responsible for the call who had a possessory interest in a switch used to route the calls. In so concluding, the *Bureau Liability Order* rejected Network's argument that the Debit Card Providers were "facilities-based" because the Debit Card Providers could track call completion data from Network's switches via the Internet.[15] In other words, the *Bureau Liability Order* rejected Network's contentions that, in this context, call tracking ability equates to switching capability, and switching capability makes an entity "facilities-based."[16] Accordingly, the *Bureau Liability Order* granted the Complaint and held that Network is the entity responsible for paying payphone compensation to APCC.[17]

## III. DISCUSSION

### A. The Bureau Correctly Determined that Network Is Liable for Payment of Dial-Around Compensation.

5. In its Application for Review, Network reiterates the same arguments it made below regarding the meaning of the relevant payphone compensation requirements. As it asserted previously, Network argues that, prior to the issuance of the *Bureau Liability Order*, the Commission had not clearly expressed the requirement that, to be considered "facilities-based" for payphone compensation purposes, an entity must have a possessory interest in a switch used to route the coinless payphone calls at issue.[18] According to Network, the Commission had previously suggested that an entity may be

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[15] *Bureau Liability Order*, 20 FCC Rcd at 2077-78, ¶¶ 10-12, 2082, ¶ 20.

[16] *Bureau Liability Order*, 20 FCC Rcd at 2083-84, ¶¶ 22-23.

[17] *Bureau Liability Order*, 20 FCC Rcd at 2079-80, 2085, ¶¶ 14-16, 26.

[18] Application at 12-16; Reply to Opposition to Application for Review, File No. EB-003-MD-011, at 2, 4, n.3 (filed Mar. 25, 2005) ("Reply").

considered a "facilities-based" carrier under the payphone compensation rules, even if the entity has no possessory interest in a switch, as long as the entity somehow manages, in some other way, to "maintain its own switching capability."[19] Network also asserts, as it did below, that the Debit Card Providers do "maintain their own switching capability," even though they do not have a possessory interest in a switch, because the Debit Card Providers have what Network describes as "call tracking ability."[20] Thus, in Network's view, the Bureau erred by applying a "possessory interest" standard and by declining to find that the Debit Card Providers are "facilities-based" carriers liable for payphone compensation.

6. We reject Network's assertions and affirm the Bureau's determinations, including the Bureau's interpretation of our precedent that "switching capability" means a possessory interest in a switch, such as a lease interest or ownership interest.[21] We conclude that Network's construction of Commission precedent (i) ignores the commonly understood meaning of the term "facilities-based;"[22] (ii) overlooks a reasonable interpretation of governing language in a key Commission order;[23] and (iii) undermines the primary purpose of the payphone compensation rules.[24] We also agree with the Bureau that Network's claim must fail, even assuming, *arguendo*, that an entity who "maintains its own switching

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[19] Application at 12-16; Reply at 4.

[20] Application at 16-18; *see* Reply at 3-4 (arguing that "switching capability" and "call tracking ability" are synonymous).

[21] *See, e.g., In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, 11 FCC Rcd 21233, 21277 at ¶ 92 (1996) (subsequent history omitted).

[22] *Bureau Liability Order*, 20 FCC Rcd at 2079, 2081, ¶¶ 15-16, 19.

[23] *Bureau Liability Order*, 20 FCC Rcd at 2081, ¶ 18.

[24] *Bureau Liability Order*, 20 FCC Rcd at 2082, ¶ 20.

capability" can be considered a "facilities-based" carrier despite lacking a possessory interest in a switch (which is not actually possible). Here, the Debit Card Providers had only call tracking ability. "Switching capability" and "call tracking ability" are not synonymous; the former encompasses far more functions than the latter.[25] Thus, Network has failed to demonstrate that the Debit Card Providers "maintain their own switching capability." Hence, we affirm in its entirety the *Bureau Liability Order* granting the Complaint, and find that Network is liable for payment of dial-around compensation to APCC.[26]

## B. The Bureau Did Not Commit Error in Deferring its Ruling on Two Motions.

7. As permitted by our rules,[27] APCC "bifurcated" its claims, asking for a ruling on liability issues first and, then, if liability were found, a subsequent ruling on the amount of damages owed.[28] During this liability phase of the proceeding, the Bureau decided to defer until the damages phase (if any) ruling on two motions filed by APCC.[29] These two motions

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[25] *Bureau Liability Order*, 20 FCC Rcd at 2083-84, ¶¶ 22-23.

[26] As it did below, Network makes some cursory arguments about how the Commission has previously recognized that certain novel arrangements for conveying assets have been deemed to convey possessory interests. Reply at 5. We agree with the Bureau that there is no material resemblance between Network's agreements with the Debit Card Providers and the arrangements listed in Network's Reply. *See Bureau Liability Order*, 20 FCC Rcd at 10-11, ¶ 21.

[27] 47 C.F.R. § 1.722(d).

[28] Complaint at 24. APCC has now filed a supplemental complaint for damages. Supplemental Complaint for Damages, File No. EB-003-MD-011 (filed April 4, 2005) ("Supplemental Complaint").

[29] *APCC v. NetworkIP, LLC*, Letter from Radhika Karmarkar, FCC, to Counsel, File No. EB-03-MD-011 (rel. July 8, 200[3]); *APCC v. NetworkIP, LLC*, Letter from Radhika Karmarkar, FCC, to Counsel, File No. EB-03-MD-011 (rel. June 13, 2003).

essentially concern whether the statute of limitations reduces the amount of damages for which Network is potentially liable.[30]

8. Network asserts that the Bureau's deferral constitutes prejudicial error, because APCC's motions are obviously meritless, and "it is not practical to conduct an investigation until the parties know the relevant time period in dispute."[31] Network states that the Commission should, therefore, rule now that the statute of limitations reduces the scope of APCC's potential damages.[32]

9. We disagree. In complaint proceedings bifurcated into liability and damages phases, the Commission has provided Bureau staff with discretion to determine which issues should be reached in which phase in order to manage the matter in the most efficient and fair manner.[33] Encompassed within that discretion is the determination whether a statute of limitations issue should be reached in the liability phase or the damages phase, especially where, as here, the defendant concedes that a material portion of the alleged damages accrued within the

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[30] The first motion seeks waiver of the "relation back" deadline in 47 C.F.R. § 1.718, Complainants' Motion for Partial Waiver of Section 1.718 of the Commission's Rules, File No. EB-003-MD-011 (filed June 3, 2003); and the second motion seeks permission to file a reply regarding Network's response to the first motion. Complainants' Conditional Motion for Leave to File Reply, File No. EB-003-MD-011 (filed June 17, 2003).

[31] Application at 5-6. *See id.* at 4, 8-9.

[32] Application at 4-10. We note that, in the damages phase of the proceeding, the Enforcement Bureau did rule on the two motions at issue here. *APCC v. NetworkIP, LLC*, Order, 20 FCC Rcd 16727 (Enf. Bur. 2005).

[33] *See, e.g., Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497, 22501, ¶ 5, 22511, ¶ 30, 22539, ¶ 95, 22549, ¶ 116, 22558-22559, ¶¶ 143-44, 22575, ¶ 178, 22581, ¶ 194 (1997) (describing the broad discretion that the Commission delegated to staff to structure complaint proceedings) (subsequent history omitted).

limitations period.[34] Indeed, Network itself seems to acknowledge that the statute of limitations issue here pertains more to the "investigation of damages" than to the investigation of liability.[35] Accordingly, we conclude that it was reasonable and not prejudicial for the Bureau to defer ruling on APCC's motions in the liability phase of this proceeding. Consequently, we deny Network's Application for Review on this ground.

### C. Network's Failure to Pay Dial-Around Compensation Constitutes an Unjust and Unreasonable Practice in Violation of Section 201(b) of the Act.

10. As stated above, the *Bureau Liability Order* held that Network's failure to pay dial-around compensation constitutes a violation of section 201(b) of the Act, which prohibits a common carrier from engaging in any "practice[ ] ... in connection with ... communication service ...that is unjust and unreasonable."[36] Put differently, the *Bureau Liability Order* held that Network's failure to pay payphone compensation as required by rule 64.1300 is an unjust and unreasonable practice in connection with communication service within the meaning of section 201(b) of the Act.

11. After the release of the *Bureau Liability Order*, federal courts have differed about whether the Commission has sufficiently ruled that a violation of its payphone compensation rules constitutes a violation of section 201(b) of the Act, such that a payphone service provider has a private cause of action under the Act to recover unpaid payphone compensation.[37] In

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[34] *See generally AT&T Corp. v. BellSouth Telecommunications, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 23898, 23915 at ¶ 45 (2005) (deferring to the damages phase the question of the extent to which the statute of limitations affected the amount of recoverable damages).

[35] *See* Application at 5-6.

[36] 47 U.S.C. § 201(b).

[37] *Compare APCC Services, Inc. v. Sprint Comm. Co.*, 418 F.3d 1238 (D.C.

light of this split of authority, we take this opportunity to reaffirm and amplify what the Commission has concluded twice before: that "failure to pay in accordance with the Commission's payphone rules, such as the rules expressly requiring such payment ... , constitutes ... an unjust and unreasonable practice in violation of section 201(b) of the Act."[38] This interpretation rests on the plain language of section 201(b) and on the crucial importance of ensuring fair compensation for payphone service providers.

12. The question presented is: whether a failure to pay payphone compensation in accordance with the Commission's rules is, within the meaning of section 201(b), a (i) "practice in connection with" (ii) "communication service" (iii) that is "unjust and unreasonable."[39] We answer in the affirmative, for the following reasons.[40]

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Cir. 2005) ("*APCC v. Sprint*") (holding that the Commission has not yet made a "clear statement (and analysis)" that a violation of its payphone compensation rules constitutes a violation of section 201(b) of the Act), *with Metrophones Telecommunications, Inc. v. Global Crossing Telecommunications, Inc.*, 423 F.3d 1056 (9th Cir. 2005), *cert granted*, 126 S.Ct. 1329 (2006) ("*Metrophones v. Global Crossing*") (holding that the Commission has already made a "fair and considered judgment" that a violation of its payphone compensation rules constitutes a violation of section 201(b) of the Act); *Flying J, Inc .v. Sprint Communications Co.*, 2006 WL 18603 (D. Utah Jan. 4, 2006) (same as *Metrophones v. Global Crossing*); *APCC v. Sprint*, 418 F.3d at 1253-1255 (dissenting opinion of Chief Judge Ginsburg) (same as *Metrophones v. Global Crossing*).

[38] *In the Matter of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of* 1996, Report and Order, 18 FCC Rcd 19975, 19990, ¶32 (2003) ("*2003 Report and Order*"), *aff'd*, Order on Reconsideration, 19 FCC Rcd 21457, 21459 n.17 (2004) ("*2004 Recon Order*"). As Chief Judge Ginsburg observed in dissent in *APCC v. Sprint*, "[t]he court can say '[t]here was no authoritative interpretation of § 201(b) in this case' only because it makes no mention of the 2003 Report and Order and fails to note that the Commission filed an amicus brief in this case advancing the same position." *APCC v. Sprint*, 423 F.3d at 1254.

[39] 47 U.S.C. § 201(b).

[40] *See Metrophones v. Global Crossing*, 423 F.3d at 1067-1070 (finding that

13. First, the "communication service" referenced in section 201(b) plainly includes the "communication by wire" referenced in section 201(a).[41] The Act defines "communication by wire" as "the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission...."[42] When a carrier receives and transports payphone calls, it engages in the transmission of sounds by aid of wire between the points of origin and reception of such calls. Accordingly, when a carrier receives and transports payphone calls, it engages in "communication service" within the meaning of section 201(b).[43]

14. Second, a carrier's obligation to pay payphone compensation under our rules arises solely from its receipt and

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a failure to pay payphone compensation in accordance with the Commission's rules is, within the meaning of section 201(b), a practice in connection with communication service that is unjust and unreasonable, for the reasons we explain below); *APCC v. Sprint*, 418 F.3d at 1254-1255 (dissenting opinion) (same).

[41] 47 U.S.C. §§ 201(a), (b).

[42] 47 U.S.C. § 153(51).

[43] In various contexts, the Commission has treated payphone service as a communications service. *See, e.g., In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, 11 FCC Rcd 21233, 21340-41, ¶ 244 (1996) (stating that "all payphones serve the public interest by providing access to basic communications services") (subsequent history omitted); *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 12 FCC Rcd 20997 (1997) (discussing tariffing requirement for basic payphone services provided by the Bell Companies); *In the Matter of Request to Update Default Compensation Rate for Dial-Around Calls from Payphones*, Report and Order, 19 FCC Rcd 15636, 15644, ¶ 20 (2004) (finding "payphone services are particularly critical to those with few other communications service options"); *see also APCC v. Sprint*, 418 F.3d at 1254-1255 (dissenting opinion).

transport of a payphone call. It follows that a carrier's failure to fulfill that obligation is a "practice in connection with" its communication service of transmitting the call.[44]

15. Third, a carrier's failure to pay payphone compensation rises to the level of being "unjust and unreasonable." This misconduct achieves such "magnitude,"[45] for at least two reasons. First, a failure to pay payphone compensation is not a tariff or contract violation, but a direct violation of Commission rules.[46] Second, a carrier's failure to pay payphone compensation in accordance with the Commission's rules undermines the attainment of an express Congressional goal – to "promote the widespread deployment of payphone services to the benefit of the general public...."[47] Specifically, to help achieve the goal

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[44] *See Metrophones v. Global Crossing*, 423 F.3d at 1067-1070; *APCC v. Sprint*, 418 F.3d at 1254-1255 (dissenting opinion).

[45] *APCC v. Sprint*, 418 F.3d at 1248 (noting that, in a 1999 order, the Commission did not specify that a failure to pay payphone compensation reached the "magnitude" of an unjust and unreasonable act).

[46] The fact that a failure to pay payphone compensation directly violates Commission rules specifically requiring such payment distinguishes this situation from other situations where the Commission has repeatedly declined to entertain "collection actions." *See, e.g., U.S. Telepacific Corp. v. Tel-America of Salt Lake City, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 24552, 24555-56, ¶¶ 8-10 (2004) ("*Telepacific v. Tel-America Order*"). Specifically, whereas the payphone compensation rules directly impose payment duties on the payor, the rules and statutory provisions regarding the charges at issue in other kinds of "collection actions" impose duties only on the payee (*i.e.*, duties to impose charges in a certain manner and/or in a certain amount) and not on the payor. *See, e.g., Telepacific v. Tel-America Order*, 19 FCC Rcd at 24556, n.28. Thus, the failure to pay in the latter situation does not contravene the Act or our rules, though it may be unlawful on other grounds and thus actionable in court. *See, e.g., TelePacific v. Tel-America Order*, 19 FCC Rcd at 24555-56, ¶¶ 8-10.

[47] 47 U.S.C. § 276(b)(1). The Commission recently explained some of the reasons why Congress believed it important to promote the widespread deployment of payphones: "We acknowledge, as did Congress in passing section 276, that payphones ... provide a unique back-up communications option when subscription services – whether wireline or wireless – are

of widespread deployment of payphones, Congress directed the Commission to adopt swiftly rules to ensure that "all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone...."[48] Thus, Congress viewed our payphone compensation rules – and, *ergo*, carriers' compliance with those rules – as crucial to the statutory scheme. As the Commission has explained:

> "[S]ection 276 makes it our responsibility to ensure that inadequate compensation does not cause deployment to drop to levels insufficient to serve the public interest.... The purpose of that rate prescription [in our payphone compensation rules] is ... to support, to the extent possible, a functioning market and promote payphone deployment by ensuring that dial-around calls bear an appropriate share of the costs of operating payphones."[49]

In other words, a carrier's failure to pay payphone compensation in accordance with our rules reduces payphone revenues, which, in turn, can ultimately facilitate a reduction in the deployment of payphones. Consequently, a carrier's failure to pay payphone compensation in accordance with our rules strikes at the heart of Congress' design for implementing an important statutory

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unaffordable or unavailable. Payphone services are particularly critical to those with few other communications service options – including low-income customers, the elderly, and residents of rural areas. Payphones also enhance access to emergency (public health and safety) services." *In the Matter of Request to Update Default Compensation Rate for Dial-Around Calls From Payphones*, Report and Order, 19 FCC Rcd 15636, 15644 at ¶ 20 (2004) ("*Compensation Rate Order*") (footnotes omitted).

[48] 47 U.S.C. § 276(b)(1)(A).

[49] *Compensation Rate Order*, 19 FCC Rcd at 15644-15645, ¶¶ 21, 25. *Id.* at 15645, ¶ 24 (noting the connection between payment of the dial-around compensation rate under our rules and the level of payphone deployment).

objective.[50] Such misconduct clearly amounts to unjust and unreasonable action.[51]

16. Accordingly, we reiterate here what the Commission has previously stated both expressly[52] and implicitly:[53] failure to pay in accordance with the Commission's payphone compensation rules constitutes an unjust and unreasonable practice in violation of section 201(b) of the Act.

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[50] *See generally Compensation Rate Order*, 19 FCC Rcd at 15644-, ¶¶ 21 ("[D]eclining [payphone] deployment is causing inconvenience to consumers and may even be starting to pose a public safety issue. The public, community organizations, and government officials view the decline in deployment as a negative development.") (footnotes omitted).

[51] *See Metrophones v. Global Crossing*, 423 F.3d at 1067-1070; *APCC v. Sprint*, 418 F.3d at 1254-1255 (dissenting opinion). *See generally Alexander v. Sandoval*, 532 U.S. 275, 284 (2001) (stating that a private cause of action lies for violation of an agency regulation that authoritatively interprets a statutory provision within the agency's delegated authority). We note that there is no basis for limiting the scope of section 201(b) to violations only of Commission rules promulgated pursuant to section 205 of the Act, 47 U.S.C. § 205. *See, e.g., Metrophones v. Global Crossing*, 423 F.3d at 1067-1070 (and Commission orders cited therein); *APCC v. Sprint*, 418 F.3d at 1254-55 (and Commission orders cited therein) (dissenting opinion).

[52] *2003 Report and Order*, 18 FCC Rcd at 19990, ¶ 32; *2004 Recon Order*, 19 FCC Rcd at 21459 n.17.

[53] *See, e.g., In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Report and Order, and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545, 22648 at ¶ 232 (1999) (citing section 201as authority for promulgating payphone compensation rules) (subsequent history omitted); *Bell Atlantic-Delaware, Inc. v. Frontier and Bell Atlantic-Delaware, Inc. v. MCI Telecom. Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 8112 (2001) (granting two complaints for damages for failure to pay dial-around compensation). *See also APCC Services, Inc. v. TS Interactive, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 10456 (Enf. Bur. 2004) (granting complaint for damages for failure to pay dial-around compensation); *Illinois Bell Tel. Co. v. One Call Communications, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 16697 (Enf. Bur. 2001) (granting complaint for damages for failure to pay dial-around compensation).

* * * * * * * * * * * * *

17. In sum, we agree with the Bureau that, because Network has a possessory interest in switches used to route the payphone calls at issue, Network is a facilities-based carrier whose failure to pay dial-around compensation to APCC constitutes a violation of section 64.1300 of our rules, and thus section 201(b) of the Act.[54] Moreover, we disagree with Network that the Bureau committed error by failing to address immediately two motions related to Network's statute of limitations defense. Consequently, we deny Network's application for review and affirm the *Bureau Liability Order*.

## IV. ORDERING CLAUSE

18. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 201(b), 208, and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201(b), 208, and 276, and sections 1.115, 1.720-1.736, and 64.1300 of the Commission's rules, 47 C.F.R. §§ 1.115, 1.720-1.736, and 64.1300, that Network's Application for Review IS DENIED, APCC's motion to strike IS DISMISSED as moot, and the *Bureau Liability Order* IS AFFIRMED to the extent described herein.

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[54] Because our finding of a violation of section 201(b) of the Act will afford APCC all of the relief to which it would be entitled upon a finding of a violation of section 276 of the Act, we need not and do not reach the Bureau's conclusion that Network's conduct violated section 276 as well as section 201(b). *See generally APCC v. Sprint, supra; Greene v. Sprint Communications Co.*, 340 F.3d 1047 (9th Cir. 2003) (both decisions holding that section 276 does not establish a private cause of action to recover payphone compensation).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary